IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1950.~~ 54

No. ~~358.~~ 2

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,
Petitioners,

vs.

DUANE E. MINARD, Jr., Prosecutor for Essex County, New Jersey, *et als.*,
Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 458.

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,

Petitioners,

vs.

DUANE E. MINARD, JR., Prosecutor for Essex County, New Jersey, *et als.*,

Respondents.

BRIEF OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I.

Reference to Official Report of Opinion Delivered in the Court Below (*).

The opinion of the United States Court of Appeals for the Third Circuit, the court immediately below, which affirmed the judgments of the United States District Court,

(*) Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages of the printed record of the court below.

District of New Jersey, is officially reported at 184 F. (2d) 575.

II.

Counter-statement Concerning Jurisdiction.

Counsel for petitioners state in their petition (p. 3), without elaboration, that the jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, Title 28 U. S. C. A.

We respectfully submit that the decision of the United States Court of Appeals for the Third Circuit in the instant cases involving the questions presented in the petition is in conformity with the provisions of the Federal Constitution respecting the right to freedom from unreasonable search and seizure,(1) and the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

III.

Counter-statement of the Case.

On December 9, 1949, two detectives attached to the Prosecutor's Office of Essex County, State of New Jersey, together with local police officers of the Police Department

(1) Constitution of the United States, Amendment IV.

of the City of Newark, Essex County aforesaid, gained entry into the premises of George Stefanelli, one of the petitioners herein, at 88 Tremont Avenue, Newark, where Stefanelli was discovered in the act of committing the crime of Bookmaking, the taking of bets over the telephone on the results of horse races. The officers placed Stefanelli under arrest and seized various articles such as racing papers, slips, memoranda and paraphernalia pertaining to Bookmaking in Stefanelli's immediate possession and control. Stefanelli was forthwith arraigned before the Police Magistrate on formal complaint and released in bail to await the action of the Grand Jury.

On April 5, 1950, local police officers of the City of Newark gained entry to premises at 201 North 13th Street, Newark, and discovered Jerry Malanga, Joseph Maglione and Frank D'Innocenzio, three of the petitioners herein, also in the act of committing the crime of Bookmaking. The officers placed them under arrest and seized various articles in their immediate possession and control pertaining to Bookmaking, such as racing papers, scratch-sheets, run-down sheets, slips, papers, memoranda, radio and telephone. They likewise were arraigned forthwith before the Police Magistrate on formal complaint and released in bail to await Grand Jury action.

Under New Jersey law, it is a misdemeanor to "make or take what is commonly known as a book, upon the running, pacing or trotting of any horse, mare or gelding," which is commonly referred to as the crime of Bookmaking; and upon conviction a mandatory penalty shall be imposed of a fine of not less than $1,000 nor more than $5,000, or

imprisonment for a term of not less than one year nor more than five years. (2)

On April 11, 1950, after Stefanelli had been indicted by the Grand Jury and while awaiting trial, he instituted a suit in equity in the United States District Court, District of New Jersey, wherein he sought to have the Court restrain the Essex County Prosecutor, Newark police officials, and the police officers who participated in the raid on his premises, from using as evidence at his criminal State trial the various articles and property taken, upon the claim that the property had been seized without search warrant in violation of the Fourth Amendment to the Federal Constitution.

On April 14, 1950, a similar proceeding was instituted in the Federal District Court by Malanga, Maglione and D'Innocenzio, the other petitioners herein, in which the same relief was sought upon similar grounds, although these petitioners were not as yet indicted by the Grand Jury.

Motions to dismiss the complaints were filed by the defendants, and after argument, the Court ordered the complaints dismissed upon the general ground that the complainants had not exhausted their remedies under State law (R. 13; 30).

An appeal was taken from said order to the Circuit Court of Appeals for the Third Circuit, both cases being consolidated; and the Court of Appeals affirmed the judgment of the District Court (R. 42-44).

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(2) Revised Statutes of New Jersey, Title 2:135-3.

All of the complainants now join in a single petition to this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals.

IV.

Summary of the Argument.

We respectfully submit:

First: The District Court properly refused to exercise its injunctive power to restrain the State prosecuting authorities from using, in the State criminal prosecutions, evidence allegedly procured without search warrant; and it properly applied the rule of comity between the Federal and State courts and the doctrine of exhaustion of State remedies.

Second: The doctrine of *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct. 1359, that the right to freedom from unreasonable search and seizure under the Fourth Amendment cannot be protected through the Fourteenth Amendment, is applicable.

V.

THE ARGUMENT.

POINT ONE.

The United States District Court properly refused to exercise its injunctive power to restrain the State prosecuting authorities from using, in the State prosecutions, evidence allegedly procured without search warrant; and it properly applied the rule of comity between the Federal and State courts and the doctrine of exhaustion of State remedies.

The gist of petitioners' argument seems to be that the Federal Court should have exercised its injunctive power in restraining the State prosecuting authorities from use of the evidence procured by State officers without search warrant, because of the imminent danger of petitioners' conviction in the State court on such evidence and the consequent mandatory penalty to be imposed; because exhaustion of State remedies would involve a "multiplicity of actions;" and that the Civil Rights Laws are a sufficient basis for the granting of the relief sought.

With this we cannot agree.

It is the respondents' contention that in denying the relief sought by petitioners, the District Court properly applied the rule of comity between the Federal and State courts, and the doctrine of exhaustion of State remedies.

The seizure of the property pertaining to Bookmaking was done by State police officers; by members of the County

Prosecutor's Office and of the local municipal police department. Not a single officer of the Federal Government or of any Federal enforcement agency had anything to do with the arrest and seizure.

The property seized consisted of papers, slips, memoranda, racing papers, scratch-sheets, "run-down" sheets, radios and telephones, the usual equipment and paraphernalia necessary to conduct the practices of what is known as Bookmaking on horse races.

Bookmaking is a crime under New Jersey law.

Criminal prosecutions were pending in the State court when petitioners instituted their proceedings in the Federal Court wherein they sought suppression and return to them of the property.

Petitioners concede that the property was used in the commission of the crime; and in their complaints in the Federal Court they conceded that the evidence was evidential *per se* and would be admissible in the State criminal prosecution when they stated, "The matters and things taken by the said police officers were concededly evidential *per se*, and, therefore, admissible in evidence under the law of the State of New Jersey in a prosecution for the crime of Bookmaking." (R. 15; 34).

The State of New Jersey has rejected the doctrine in *U. S. v. Weeks*, 232 U. S. 383, and has adopted the rule that evidence procured as the result of an unreasonable search and seizure is admissible *if evidential per se*. (*State* v. *MacQueen*, 69 N. J. L. 522; *State* v. *Lyons*, 99 N. J. L. 301; *State* v. *Giberson*, 99 N. J. L. 85; *State* v. *Pinsky*, 6 N. J. Super. 90).

The substance of petitioners' complaints in the District Court was that, because the property is evidential *per se* and admissible in evidence under the New Jersey rule in the criminal State prosecution, they would suffer "irreparable harm and injury" because of their futility in objecting to the evidence and the strong possibility of conviction and mandatory penalty of fine or imprisonment.

Petitioners cite *Fenner* v. *Boykin*, 271 U. S. 240; *Ex parte Young*, 209 U. S. 123; *Packard* v. *Banton*, 264 U. S. 140; and *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45. (B. p. 10), as authority for the rule that injunctive relief in the Federal courts may be allowed in "exceptional circumstances" upon a clear showing that the irreparable injury is both imminent and great.

We do not quarrel with the rule except that in those cases the "exceptional circumstances" cannot be compared with what the petitioners claim to be an "irreparable injury" here.

Examination of those cases will disclose that in *Fenner* v. *Boykin, supra*, State prosecuting officials were sought to be restrained from enforcing a State statute making it unlawful to deal in agreements for the purchase and sale of cotton for future deliveries, and the relief asked was denied.

In *Ex parte Young, supra*, the confiscatory character of a State statute fixing railroad rates was involved, and it was held that the Federal courts will, in a proper case, interfere with enforcement of such a statute where it tends to confiscate property in violation of due process under the 14th Amendment.

In *Packard* v. *Banton, supra,* the Federal Court was upheld as having properly dismissed a complaint seeking to restrain enforcement of a State statute regulating taxicab companies and requiring owners to furnish indemnity bonds to secure payment of judgments recovered for personal injuries and property damage.

Beal v. *Missouri Pac. R. Co., supra,* supports the position of the respondents. There the plaintiffs sought to restrain the State prosecuting officials from enforcing by criminal prosecution the Nebraska "Full Train Crew Law," and in upholding the lower court's refusal to intervene, this Court made the following pertinent statements on the applicable rule of comity and exhaustion of State remedies, p. 420 of opinion in 61 S. Ct.:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. (citing cases). No citizen or member of the community is immune from prosecution, in good faith, for his criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. (citing cases).
>
> "This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. (citing cases). The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their mean-

ing and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds.". (citing cases).

Carter v. *Illinois*, 329 U. S. 173, (quoted from B. p. 10), involved the constitutional right of a defendant to the aid and assistance of counsel, and it was held that there was nothing in the case to indicate any infringement of such right.

Snyder v. *Massachusetts*, 291 U. S. 97 (B. p. 10) merely held that in a prosecution for murder the refusal of the trial court to permit the defendant to be present when the jury was allowed to view the scene of the crime was not a violation of due process under the 14th Amendment to the Federal Constitution.

There is abundant authority to support the rule applied by the District Court that it will refrain from exercising its injunctive power to restrain State criminal prosecutions in deference to the comity existing between the Federal and State courts.

In *Douglas* v. *Jeanette*, 319 U. S. 157; 63 S. Ct. 877, this Court approved the refusal to restrain municipal authorities from enforcing an ordinance prohibiting the distribution of pamphlets without license first obtained under penalty of fine or jail sentence, it being held that such interference should be refused in the case of a "threatened" criminal prosecution on the Court's own motion.

Here the District Court was asked to exercise its injunctive power to restrain the State prosecuting authorities from using at the State trials the evidence procured with-

out search warrant because the "irreparable harm and injury" was the risk of conviction and imposition of mandatory penalty. The Court refused to exercise its power, based upon an observance of the rule of comity and an application of the doctrine of exhaustion of State remedies.

We submit the Court of Appeals properly supported the District Court when it stated that, "Every question here raised by the appellants may be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open." (R. 42).

The same constitutional questions raised in the District Court may well be urged in the State courts of New Jersey in connection with the criminal prosecutions, and the same questions may be determined by the appellate courts and in the State court of last resort. Thereafter, in the event of an adverse determination, petitioners may apply for certiorari to this Honorable Court.

It is to be noted that under the New Rules of New Jersey practice and procedure, petitioners may apply for certification directly from the County Court to the Supreme Court of New Jersey "Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court." (3)

In *Darr* v. *Burford*, 70 S. Ct. 587, a prisoner serving a sentence under a State conviction applied for *habeas corpus* in the State courts, claiming he had been deprived of his constitutional rights relating to right of counsel. After exhausting his remedies in the State courts he applied for

(3) Rule 1:5-3(a) of the Supreme Court of New Jersey.

habeas corpus in the Federal District Court and his application was denied. The denial was upheld by the Circuit Court of Appeals. On certiorari, this Honorable Court held that the *habeas corpus* was properly denied, because, in order to comply with the rule of exhaustion of State remedies and the rule of comity, the defendant should have applied to this Honorable Court for certiorari immediately after the determination by the State Supreme Court which had passed squarely upon the constitutional questions involved. In reaffirming the rule of comity and the doctrine of exhaustion of State remedies, this Honorable Court emphasized the necessity of avoiding conflict between Federal and State courts, whereby one court refuses to take action until the courts of another sovereignty had had an opportunity of passing on the matter. It approved the following language taken from *Covell* v. *Heyman*, 111 U. S. 176, 182 (p. 591 of opinion in 70 S. Ct.):

> "'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity.'"

See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89.

In *Parker* v. *County of Los Angeles*, 338 U. S. 327; 70 S. Ct. 161, which involved the constitutionality of a California statute providing for a "Loyalty Check" program, this Honorable Court again affirmed the rule of comity and

exhaustion of State remedies in the following emphatic language (P. 163 of opinion in 70 S. Ct.):

> "* * * If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitely denied their claims under State law.
>
> "Due regard for our Federal system requires that this Court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law. This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court. Since the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision, all subsidiary questions fall." (cases cited).

In the instant cases, we submit the State courts are competent to decide whether petitioners had been deprived of their constitutional rights. The appropriate time for the determination of any constitutional question is at the trial of the indictments in the State courts and on appeal to the New Jersey Supreme Court. If the trial court should err to the prejudice of petitioners' constitutional rights it cannot be assumed that the New Jersey Supreme Court would suffer the error to go uncorrected. Under any circumstances, petitioners can always apply to this Honorable

Court for writ of certiorari to review any abridgment of their constitutional rights by the court of last resort of New Jersey.

POINT TWO.

Th doctrine of *Wolf* v. *Colorado*, that the right to freedom from unreasonable search and seizure under the Fourth Amendment cannot be protected through the Fourteenth Amendment, is applicable here.

We submit that the doctrine of *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct. 1359, to the effect that the right to freedom from unreasonable search and seizure guaranteed under the Fourth Amendment cannot be availed of through the Due Process clause of the Fourteenth Amendment is dispostive of the question presented here.

The facts in that case (taken from *Wolf* v. *People*, 187 P. (2d) 926) disclose that local police went to defendant's office and placed him under arrest without warrant, and upon search, made without search warrant, the officers seized certain books containing records of alleged illegal abortions committed. The claim was made in the State courts that there had been a denial of due process under the 14th Amendment because of the violation of the 4th Amendment in making the seizure without search warrant.

After all of the State remedies were exhausted, a certiorari was allowed by this Court to the Colorado Supreme Court. The question was presented whether there was a denial of due process solely because the evidence thus illegally obtained would have rendered it inadmissible in

the Federal court under the doctrine of *U. S.* v. *Weeks*, 232 U. S. 383, which is applicable only to the Federal Government and its agencies and not to the individual misconduct of local officials.

In the opinion, this Court made it plain that the rights guaranteed under the first eight Amendments which are applicable to the Federal government and officials thereof cannot be made to apply to State and local officials by resorting to the due process clause of the 14th Amendment, when it said (p. 1360 of opinion in 69 S. Ct.):

> "Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I to VIII, upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject the criminal justice in the States to specific limitations. The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration (citing cases). Only the other day the Court affirmed this rejection after thorough examination of the scope and function of the Due Process clause of the Fourteenth Amendment. Adamson *v.* California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903, 171 A. L. R. 1223. The issue is closed."

In commenting on the *Weeks* doctrine, which is applicable only in the Federal courts involving Federal officials, the Court stated that the rule was not derived from the express requirements of the Fourth Amendment, nor was it based upon legislation expressing Congressional policy in the enforcement of the Constitution, but it was a mere

"rule of exclusion;" that is, a rule of evidence drawn as a matter of "judicial implication" adhered to strictly by the Federal courts which could be changed at any time by Congressional legislation. Thus, it held that evidence procured by local police officers cannot be excluded merely because it would be excluded if procured by Federal officers; and the reason for the exclusion is "less compelling" in the case of State and local officers, as follows (p. 1364 of opinion in 69 S. Ct.):

> "* * * The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

The definite conclusion of this Court was that the Fourteenth Amendment does not forbid evidence procured by State officials by unreasonable search and seizure, when it stated (p. 1364 of opinion in 69 S. Ct.):

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded to the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be pre-

sented should Congress under par. 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.'"

Petitioners cite *Douglas* v. *Jeanette, supra,* and *Hague* v. *C. I. O.*, 307 U. S. 496 (B. p. 8) in support of the principle that the right of freedom of speech and of religion secured by the First Amendment may be protected by injunction, and then they make the statement that, "The Fourth Amendment is in *pari materia* with the rights secured under the First Amendment," with which we do not agree.

We have hereinbefore discussed the holding in the case of *Douglas* v. *Jeanette, supra.*

And in the *Hague* case, *supra,* this Court held that the freedom of speech and lawful assembly, being inherent in the rights of citizenship, any violations thereof under the First Amendment may be protected through the Fourteenth Amendment.

Wolf v. *Colorado, supra,* specifically holds that the right of freedom from unreasonable search and seizure guaranteed under the Fourth Amendment is applicable to the action of Federal officers, and it cannot be availed of under the due process clause of the Fourteenth Amendment where the action complained of is that of State and local enforcement officers.

Perlman v. *U. S.*, 247 U. S. 7 and *Burdeau* v. *McDowell*, 256 U. S. 465 (B. p. 9), likewise hold that the protection under the 4th and 5th Amendments may be had only when the wrong is committed by officers of the Government or

any of its agencies; and those Amendments were "intended as a restraint upon the activities of sovereign authority" and "not intended to be a limitation upon other than governmental agencies."

Here we are concerned with the activities of State and local enforcement officers and not those of Federal officers.

Petitioners cite *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 (B. p. 13), in support of their contention that comity should give way to constitutional rights. Examination of that case will disclose that the rule was based upon certain circumstances existing in that case not at all similar to the situation in the instant case. There certain companies furnishing gas to customers in Oklahoma applied to the State Commission for an increase of rates and were refused. They applied to the State Supreme Court for a supersedeas and were again refused. Thereafter they applied to the Federal District Court for injunctive relief claiming that the rates fixed by the State Commission were confiscatory amounting to a denial of their constitutional rights. Applications for temporary injunctions, supported by evidence, were heard by three Federal judges, and were denied. On appeal to this Court, it was held that the companies had done all they can under the State law to get relief, to no avail. Thus came about the statement that, "Rules of comity or convenience must give way to constitutional rights." The conclusion was based upon the proposition that the plaintiffs "had done all they can under the state law," and the cases were remanded to give the plaintiffs an opportunity of showing that they would suffer irreparable injury that was great and immediate.

Bell v. *Hood*, 327 U. S. 678 (cited and quoted from B. p. 13), merely follows the general rule of equity pleading that a complaint should not be dismissed in *toto* unless the plaintiff is not entitled to any relief at all, and if the facts show that some relief should be given that relief should be allowed.

Here petitioners rely specifically upon the Civil Rights Laws, 8 U. S. C. A. 43 and 28 U. S. C. A. 1343 (3).

These statutes merely afford to any citizen claiming to be aggrieved by any wrong or injury involving infringement of his rights, privileges and immunities the right to institute a proceeding in the Federal court to remedy such wrong or injury.

We cannot conceive, in view of the established rules and principles hereinbefore discussed, that the statutes referred to were intended, or are deemed, to confer upon the Federal courts the power to act in a case of this character, where petitioners readily admit that the evidence taken by the local police is evidential *per se* of the crime they were committing. They are not entitled to have the Federal court restrain the State prosecuting officials from using the evidence against them in the State criminal prosecutions, a remedy which should be denied them by reason of the decisions of this Honorable Court.

VI.

Conclusion.

For the reasons hereinbefore discussed, we respectfully submit that the application for the writ of certiorari should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 2.

GEORGE STEFANELLI, JERRY MALANGA, JOSEPH MAGLIONE and FRANK D'INNOCENZIO,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinion Below.

Following is the opinion of the United States Court of Appeals, Third Circuit, reported in *184 F. (2d) 575:*

> "The appeals in the instant cases are without merit. Every queston here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal Courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury

which is clear and imminent. Douglas *v.* Jeanette, 319 U. S. 157. As to the application of the principles of the Fourth Amendment to the cases at bar see Wolf *v.* Colorado, 338 U. S. 25. The judgments will be affirmed."

Counter-statement of the Case.

The petitioners herein were involved in two separate cases in the United States District Court, District of New Jersey, George Stefanelli being the plaintiff in one case, and Jerry Malanga, Joseph Maglione and Frank D'Innocenzio being plaintiffs in the other.

Both cases were treated separately in the District Court, but inasmuch as the same constitutional questions were involved in both cases, they were consolidated on appeal to the Court of Appeals, and are likewise consolidated before this Court.

Hereinafter we shall refer to the first case as the "Stefanelli" case, and to the second as the "Malanga" case.

In the Stefanelli case, on the afternoon of December 6th, 1949, at about 2:45 P. M. two detectives of the Essex County Prosecutor's Office and two local police officers of the City of Newark, Essex County, gained entrance into the premises of Stefanelli at 88 Tremont Avenue, Newark, without warrant of arrest or search warrant. In the premises the officers found Stefanelli in the act of violating what is known as the Bookmaking statute of New Jersey, by the taking of wagers and bets over the telephone upon the results of horse races. The officers placed Stefanelli under arrest, and they seized various slips, papers, sheets,

memoranda and paraphernalia pertaining to the offense that were in Stefanelli's immediate possession, custody and control.

Likewise, in the Malanga case, on the afternoon of April 3rd, 1950, at about 2:00 P. M. several local police officers of the City of Newark gained entrance into premises at 201 North 13th Street, Newark, without warrant of arrest or search warrant. In the premises the officers found Malanga, Maglione and D'Innocenzio in the act of violating the State Bookmaking statute by the taking down of wagers and bets over the telephone upon the results of horse races. The officers placed the three men under arrest, and they seized various slips, papers, racing sheets, memoranda and paraphernalia pertaining to the crime of Bookmaking under State law.

It is a criminal offense in New Jersey to commit what is commonly known as Bookmaking.

The statute makes it a misdemeanor to "make or take what is commonly known as a book, upon the running, pacing or trotting of any horse, mare or gelding;" and upon conviction there is a mandatory penalty of a fine of not less than $1,000. nor more than $5,000. *or* imprisonment for a term of not less than one year nor more than five years.[1]

In both cases, the persons arrested were arraigned without delay before a Police Magistrate on formal complaint and released on bail to await grand jury action.

Before any State criminal trial, in the Stefanelli case, a suit was instituted in the United States District Court

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[1] New Jersey Revised Statutes, Title 2:135-3.

against the County Prosecutor, the Chief of the Newark police, and the four police officers involved, wherein the plaintiff sought of the Federal court an injuncton restraining the State officials from using the evidence in the State trial.

Likewise in the Malanga case, a similar suit was instituted against the County Prosecutor, the local police chief, the local police commissoner, and the officers who participated in the raid, wherein similar injunctive relief was sought.

Motions were filed by the defendants in the District Court to dismiss the complaints upon agreed statements of fact; and after argument and consideration the District Court granted the motions for dismissal upon the ground that plaintiffs had failed to exhaust all available State remedies.

The Court of Appeals affirmed the judgment of the District Court upon the grounds (1) that plaintiffs had not exhausted all available State remedies including application for certiorari to this Court; (2) that they failed to show an exceptional case of irreparable injury that is clear and imminent; and (3) that the doctrine of *Wolf* v. *Colorado* is applicable. (See 184 F. 2d 575).

The cases are before this Court on certiorari granted May 14th, 1951 for review of the judgment of the Court of Appeals.

Summary of the Argument.

We respectfully submit:

1. The doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 is dispostive of this case. The admission in the State criminal prosecutions of the evidence obtained by the State officers is not forbidden.

2. Petitioners cannot invoke the remedy under the Civil Rights Acts to the extent of having the Federal court enjoin the State prosecuting authorities from using in the State criminal trials the alleged unlawful evidence obtained by the State officers.

3. The established policy of comity between the Federal and State governments and the rule of exhaustion of all available State remedies are applicable.

ARGUMENT.

POINT I.

The Federal Court properly refused to enjoin the State prosecuting authorities from using, in the State prosecutions, evidence allegedly procured by state officers in violation of the Fourth Amendment, under the doctrine of *Wolf* v. *Colorado*.

Briefly, the gist of petitioners' contention (B., pp. 10-32) seems to be that, the searches and seizures made by the State officers were a violation of the Fourth Amendment to the Federal Constitution; that because of the New Jersey rule of evidence that the fruits of an unreasonable

search and seizure are admissible in evidence in a State criminal trial if they are evidential *per se*, it would be futile for petitioners to attempt to seek any redress against the use of such evidence in the State courts; that the use of the evidence will result in a conviction for which petitioners will be subject to a mandatory fine or imprisonment thereby causing irreparable injury that is clear and imminent; therefore they should have the benefit of the equitable relief afforded by the Civil Rights Acts (8 U. S. C. A. 43 and 28 U. S. C. A. 1343) and have the Federal court restrain the State prosecuting authorities from using the unlawfully obtained evidence against them in the State criminal trials.

In the proceedings in the United States District Court, District of New Jersey, the following essential undisputed facts were submitted upon an "Agreed Statement of Facts"; (1) that the searches and seizures were made by local police officers of the City of Newark and detectives of the County Prosecutor's Office, [In the Stefanelli case, by two local police officers and two Prosecutor's detectives, R. p. 11, par. 1; in the Malanga case, by four local police officers, R. p. 24, par. 1]; (2) that the criminal offense involved was the making of book on the results of horse races, commonly referred to as Bookmaking, which is a crime under New Jersey State law (N. J. S. A. 2:135-3); and (3) that the property seized pertained to the crime of Bookmaking and was admissible in evidence under New Jersey law because it was evidential *per se*.

It is the respondents' contention that the doctrine laid down by this Court in *Wolf* v. *Colorado*, 338 U. S. 25; 69 S. Ct., 1359 is applicable, to the effect that, in a prosecu-

tion in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure on the part of State officers in the same manner that similar evidence procured by Federal officers would be inadmissible in a Federal prosecution in a Federal court under the doctrine of *Weeks* v. *U. S.*, 232 U. S. 383.

In the *Wolf* case, drawn from *Wolf* v. *People*, 187 F. (2) 926, representatives of the State District Attorney's office proceeded to Wolf's office without warrant of any kind. They took the defendant into custody and in searching the office they seized two "day books" for the years 1943 and 1944 containing defendant's records of patients who had consulted him professionally. The books were admitted in evidence at his trial and they were instrumental in bringing about his conviction for conspiracy to commit abortions. The Colorado Supreme Court affirmed the conviction.

On certiorari to this Court, the specific question presented was whether the seizure of the evidence by State officers in violation of the Fourth Amendment was a violation of due process under the Fourteenth Amendment merely because the same evidence would have been inadmissible under the doctrine of *Weeks* v. *U. S.*, 232 U. S. 383 in a similar prosecution in the Federal courts where the evidence had been seized by Federal officers.

This Court emphasized the principle that the Fourteenth Amendment has not absorbed the first eight amendments as such, when it stated (p. 1360 of 69 S. C.):

> "Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I

to VIII upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e. g. Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Twining *v.* New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97; Brown *v.* Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; Palko *v.* Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. Adamson *v.* California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223. The issue is closed.'

We are mindful of various decisions of this Court wherein it has been held that the validity of certain immunities guaranteed against the Federal government by specific pledges of particular amendments in the Bill of Rights is equally binding upon the States. But only because those specific immunities have been considered to be "implicit in the concept of ordered liberty" and basic and fundamental to the right of life and liberty guaranteed by the Constitution, and thus those immunities have been brought within the scope of the Fourteenth Amendment.

Among those rights thus treated are "freedom of speech," (*Herndon* v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 422); "freedom of the press," (*Grosjean* v.

American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; *Lovell* v. *City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949); "freedom of religion" (*Hamiton* v. *Regents*, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; *Marsh* v. *Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265); "freedom of speech and assembly" (*Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423); and the right, under certain circumstances, as in capital cases, to counsel in criminal prosecutions (*Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158; *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596, 91 L. Ed. 584).

But not all of the rights and immunities guaranteed in the first eight amendments have been treated in the same manner.

For example, the Fifth Amendment provides that no person shall be held to answer for a capital or infamous crime unless on presentment or indictment of a grand jury, and it has been held that prosecution by a State may be on information at the instance of a public officer. (*Hortado* v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Gaines* v. *Washington*, 277 U. S. 81, 48 S. Ct. 468, 72 L. Ed. 793).

While the Fifth Amendment also provides that no person in a criminal case shall be compelled to be a witness against himself, it has been held that a State may by law end that privilege in a State prosecution. (*Twining* v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97).

It has also been held that the provisions of the Sixth and Seventh Amendments as to jury trials in criminal and civil cases may be modified by a State or abolished altogether. (*Maxwell* v. *Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597;

Wagner Electric Mfg. Co. v. *Lyndon*, 262 U. S. 226, 43 S. Ct. 583, 67 L. Ed. 961).

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288, where double jeopardy was claimed because, after defendant's conviction of second degree murder was reversed, he was retried and convicted of first degree murder and sentenced to death; and it was held that there was no violation of due process because there is no "general rule" that whatever would be a violation of the first eight amendments if done by the Federal government is equally unlawful by force of the Fourteenth Amendment if done by a State.

It is submitted that this Court has not thus far brought a citizen's immunity from unreasonable search and seizure, under the Fourth Amendment, into the family of fundamental rights encompassed within the protection of the due process clause of the Fourteenth Amendment.

Many times attention has been invited to the established policy of both the Federal and State governments to treat possible conflict between their powers in such a manner as to produce as little conflict as possible.

In a concurring opinion of Justice Frankfurter in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, it is stated that (p. 470):

> "* * * great tolerance toward a State's conduct is demanded of this Court. * * *"

And in *Malinski* v. *New York*, 324 U. S. 401, 438, 65 S. Ct. 781, 799, 89 L. Ed. 1029, it is stated:

> "* * * And however reprehensible or even criminal the acts of the state officials may be, in so far as

> the conduct of the trial is concerned, they do not infringe due process unless they result in the use against the accused of evidence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. * * * "

The constitutional provision against unreasonable search and seizure guaranteed by the Fourth Amendment does not in terms bar the admission of evidence obtained by its violation. The exclusionary rule of evidence as applied in the Federal courts under the *Weeks* doctrine, which has been affirmed in the *Wolf* case, was formulated by the judiciary in aid of the effectiveness of the amendment, and is available only in Federal trials where the evidence was obtained by Federal officers.

In the *Wolf* case, this Court stated (p. 1362 of 69 S. Ct.):

> " * * * But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. * * *When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. * * * "

And this Court stated that the application of the exclusionary rule under the *Weeks* doctrine is "less compelling" in the case of an unreasonable search and seizure made by local and State Officers because (p. 1364 of 69 S. Ct.):

> "* * * The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

The exclusionary rule under the *Weeks* doctrine is no more than a judicially constructed rule of evidence which can be changed at any time by Congressional legislation (p. 1364 of 69 S. Ct.):

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded to the legislative judgment on an issue as to which in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under par. 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States."

Petitioners fail to submit a single case where State prosecuting authorities were enjoined by the Federal court from using, at the State criminal trial, evidence obtained by unreasonable search and seizure by State officers, either by virtue of the Fourth Amendment or the Due Process

clause of the Fourteenth Amendment. In their Brief, petitioners cite and quote from numerous cases which we do not consider to be in point.

Perlman v. *U. S.*, 247 U. S. 7 and *Burdeau* v. *McDowell*, 256 U. S. 465, cited by petitioners (B., pp. 12-13), hold that the protection of the Fourth and Fifth Amendments may be had only when the wrong is committed by officers of the Government.

Here we are concerned with the activities of local and county enforcement officers and not Federal officers.

Hague v. *C.I.O.*, 307 U. S. 496, cited by petitioners (B., p. 13), involved the right of free speech and lawful assembly, and it was held that such rights are protected through the Fourteenth Amendment because such rights are implicit in the concept of ordered liberty.

In *Douglas* v. *Jeanette*, 319 U. S. 157, (B., p. 13), this Court approved the refusal of the Federal court to restrain municipal authorities from enforcing an ordinance prohibiting the distribution of pamphlets without first obtaining a license under penalty of fine or jail sentence, it being held that such interference was properly refused in the case of "threatened" criminal prosecution, and such refusal may be had on the Court's own motion.

Cases cited by petitioners on p. 14 of their Brief, (*Gouled* v. *U. S.*, 255 U. S. 298; *Agnello* v. *U. S.*, 269 U. S. 20; and *U. S.* v. *Lefkowitz*, 285 U. S. 452) were Federal prosecutions in the Federal courts and they did not involve the specific question here presented.

In petitioners' discussion of the *Wolf* case, they make the statement that, "In New Jersey, the courts have af-

firmatively sanctioned 'police incursions into privacy,'" and they attribute such so-called "police incursions" to the observance of the State rule of evidence to the effect that evidence procured by unreasonable search and seizure is admissibe if evidential *per se*, closing their argument with the following italicized conclusion (B., p. 28):

> "*Therefore, there is an affirmative sanction by the New Jersey courts of the police incursions complained of by petitioners and runs counter to the guaranty of the Fourteenth Amendment,* Wolf *v.* Colorado, *supra.*"

We respectfully submit that there is no basis whatsoever for any such statements of "affirmative sanction" on the part of the New Jersey courts as petitioners intimate.

New Jersey is only one of the great majority of the States which have rejected the *Weeks* doctrine as applied to State action. (See Justice Frankfurter's Appendix to the *Wolf* decision).

The rule as applied in New Jersey is a simple one and it was observed prior to the *Weeks* doctrine of 1914. It merely states a rule of evidence whereby evidence obtained by State officers in the enforcement of the State criminal laws which has been obtained without search warrant may be received in evidence provided it is evidential *per se;* that is, the evidence, in and of itself, must tend to show the commission of the crime under consideration.

The basis for the rule is that the rights guaranteed in the Bill of Rights of the Federal Constitution are limited to the sphere of the Federal Government, its courts and officers, and constitute no prohibition upon the States.

Cases cited by petitioners (B., pp. 28-29) (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Carter* v. *Illinois*, 329 U. S. 173; and *Snyder* v. *Massachusetts*, 291 U. S. 97) are not in point.

In *Oklahoma Natural Gas Co.* v. *Russell*, the rule that principles of comity should give way to constitutional rights was based upon the particular circumstances of that case. There certain gas companies supplying customers in Oklahoma applied to the State Commission for an increase of rates and were refused. An application to the State Supreme Court for a supersedeas was also refused. Then they applied to the Federal court for injunctive relief upon the ground that the rates fixed by the State Commission were confiscatory and a denial of their constitutional rights. Their application for injunctive relief heard by three Federal District judges was denied. On appeal to this Court, it was held that the companies had done all they could under State law, giving rise to the statement that, "Rules of comity or convenience must give way to constitutional rights," and the cases were remanded to give the plaintiffs an opportunity of showing irreparable injury that was great and immediate.

In *Carter* v. *Illinois*, the question involved was the defendant's right to the aid and assistance of counsel, and it was held that there was nothing in the case to indicate any infringement of that constitutional right.

In *Snyder* v. *Massachusetts* (prosecution for murder), it was held that the trial court's refusal to permit the defendant to be present when the jury viewed the scene of the crime was not a violation of due process.

Cases cited (B., p. 30) (*Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; and *Harris* v. *South Carolina*, 338 U. S. 68) involved the denial of due process under the Fourteenth Amendment because of "fundamental unfairness" in connection with confessions extracted from defendants, and the principles there involved cannot be applied here.

These cases involving extorted confessions cannot be used by way of analogy to the case at bar. There is a vast difference between an extorted confession and property taken by unlawful search and seizure. A coerced confession carries doubtful truth, while tangible property taken by search and seizure carries every likelihood of truth. There is no evidential trustworthiness in a coerced confession; but there is evidential truth in seized property. The truth value of seized property is independent of the method of procuring it. (See Wigmore on Evidence, 3d Ed., Vol. III, Sec. 822).

Williams v. *U. S.*, 71 S. C. 576 (decided April 23rd, 1951 and cited by petitioners, B., p. 30) is not in support of petitioners' contention that the right to injunctive relief is afforded by Sections 8 U. S. C. A. 43 and 28 U. S. C. A. 1343 of the Civil Rights Laws. In that case, Williams, a special police officer who had forced confessions from several persons he suspected of crime, was tried and convicted under Par. 20 of the U. S. Criminal Code (now Par. 242 of 18 U. S. C. A.) providing for punishment for whoever under "color of law" wilfully subjects an inhabitant of a State to deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States; and in affirming the judgment of conviction this Court held

that a private officer is a person "under color of law" within the intendment of the section of the Civil Rights Law under consideration; that such officer was deemed to be exercising the authority of the State; and any confessions wrung by him from the suspects by force and violence were a violation of due process and not admissible in evidence.

Cases cited by petitioners (B., p. 31), *Everson* v. *Board of Education*, 330 U. S. 1 (constitutionality of state statute providing for transportation of pupils to and from schools); *West Virginia State Board* v. *Barnette*, 319 U. S. 634 (constitutionality of regulation requiring school children to salute the American flag); and *Bridges* v. *California*, 314 U. S. 252 and *Hague* v. *C. I. O.*, *supra*, involving the protection of the 14th Amendment against violation of the right of free speech guaranteed under the First Amendment, are not applicable.

As we have heretofore pointed out, the rights of free speech and the right to freedom from self-incrimination, under the First and Fifth Amendments, have been held to be protected against State action through the due process clause of the 14th Amendment, upon the ground that such rights are "implicit in the concept of ordered liberty." (*Palko* v. *Connecticut*, *supra*).

But the right to freedom from unreasonable search and seizure against State action has not been placed in the same category. (*Wolf* v. *Colorado*, *supra*).

On page 31 of their Brief, petitioners make the statement that, "The Fourth Amendment is as equally applicable to the States as are the First and Fifth Amendments," and that there should be no distinction in their application

to State action, quoting in support from the concurring opinion of Mr. Justice Black in the *Wolf* case.

It is to be noted that Mr. Justice Black, in his concurring opinion, states that while he agrees that the Fourth Amendment is enforceable against the States, he also agrees that the method of enforcement should not be by barring the use of evidence unlawfully obtained, as follows (p. 1367 of 69 S. Ct.):

> "• • • • I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures', but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. See McNabb *v.* United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819. This leads me to concur in the Court's judgment of affirmance."

POINT II.

Petitioners cannot invoke the Civil Rights Acts to the extent of having the Federal Court restrain the State from using, in State prosecutions, evidence allegedly obtained in violation of the Fourth Amendment.

As we pointed out under Point I, the doctrine of the *Wolf* case is that, although the right guaranteed by the

Fourth Amendment against unreasonable searches and seizures may be binding upon the States as well as the Federal government, the same method of enforcement of the right employed in the Federal courts against Federal officers by means of the exclusionary rule under the *Weeks* doctrine cannot be employed against the States in State criminal prosecutions, because the exclusionary rule is not a command of the Fourth Amendment but merely a judicially created rule of evidence which Congress at any time might negate.

It is the respondents' contention that, in view of the Wolf doctrine the petitioners cannot avoid the application of that doctrine by resorting to the Civil Rights Acts to accomplish their purpose, and the statutes cannot be used as a vehicle for a Federal civil action in equity to restrain State officials from using the alleged unlawfully procured evidence in the State criminal trials.

Following are the statutes upon which petitioners rely:

Title 8 U. S. C. A. Sec. 43 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress."

Title 28 U. S. C. A. Sec. 1343 provides:

> "(a) The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constituttion of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Petitioners in their suit did not seek damages, compensatory or punitive, or both, for the alleged infringement of their constitutional rights from the State officers. They sought only the "suppression" of the illegal evidence by having the Federal court issue an injunction against the State officials to restrain them from using the evidence at petitioners' State trial.

Petitioners state, page 25 of their Brief:

> "* * * the petitioners * * * *seek only to suppress the evidence unlawfully and unreasonably taken from them. They do not seek to enjoin the respondents from prosecuting them upon the indictments* now pending against them in the New Jersey Courts, and which arise from their arrests after the unlawful searches and seizures of which they complain in these proceedings."

Cases cited and quoted from by petitioners (B., p. 33) (*Keiser* v. *Walsh*, 118 F. (2) 13; *Ware* v. *Travelers Ins. Co.*, 150 F. (2) 463; and *Bell* v. *Hood*, 327 U. S. 678) merely uphold the rule of pleading that a complaint seeking equitable relief should not be dismissed in toto unless the plaintiff is not entitled to any relief at all, and if the facts warrant any relief at all that relief should be allowed.

We do not quarrel with the rule except that in the instant case petitioners sought only the injunctive relief to

restrain State officials from using the evidence illegally procured, and, under the *Wolf* doctrine, they were not entitled to such relief.

We have discussed the case of *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290 under our Point I and it is not in point.

Massachusetts State Grange v. *Benton*, 272 U. S. 525, cited and quoted from B., p. 35, would seem to support the respondents' position in the case at bar. There the plaintiffs sought the aid of the District Court to restrain State officials from carrying out the provisions of a State Daylight Saving Law upon the ground that it was inconsistent with a Federal statute and that it was unconstitutional; and this Court affirmed the dismissal of the proceeding for failure to show the necessity for the relief under the applicable rule that no injunction should issue against State officers with authority to enforce a State law "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

We submit that in the instant case the petitioners readily admit that the evidence seized pertained to a violation of the New Jersey Bookmakng statute and that it was evidential *per se* under the New Jersey rule of evidence.

The irreparable injury they claim they would suffer by use of the evidence is that it would lead to a conviction and mandatory penalty of fine or imprisonment.

Is this the nature of "irreparable harm and injury" which a person is entitled to be relieved of under the Civil Rights Laws by having the Federal court issue an injunc-

tion to stay the arm of State officials authorized to enforce the criminal laws?

Cases we have examined wherein relief was sought under the Civil Rights Laws have been cases where the plaintiffs sought damages. (See *McShane* v. *Moldovan*, 172 F. 2d 1016, C. C. A. 6th, 1949; and *Picking* v. *Penn. R. Co.*, 151 F. 2d 240, C. C. A. 3d, 1945).

Screws v. *U. S.*, 325 U. S. 91, 63 S. Ct. 1031 was a case where a criminal action was brought against State officials for violation of due process based upon 18 U. S. C. A. Sec. 52 and 88, and in upholding the conviction this Court held that such a proceeding was proper against State officers acting under "color of law". (See *Williams* v. *U. S.*, *supra*).

The only case we have been able to find of similar character to the case at bar is *Erickson* v. *Hogan*, 94 F. Supp. 459 (D. C. S. D. N. Y. 1950). There the plaintiff, under 28 U. S. C. A. 1343, brought suit in the District Court to enjoin the New York District Attorney and others from the use, and to compel the return, of property taken from plaintiff by State and City law enforcement officials. The injunction was denied upon the ground that plaintiff had available to him a remedy under State law. The Court followed *Wolf* v. *Colorado*, *supra*, to the effect that due process of law under the 14th Amendment is not violated by the use of unlawfully seized property in State prosecutions. The Court held that plaintiff was not entitled to injunctive relief, although he was given the opportunity of amending his complaint so as to claim monetary damages.

In the case at bar, upon being denied the injunctive relief sought, petitioners could have requested, and undoubt-

edly they could have obtained, an amendment of their complaint so as to allow them to claim compensatory or punitive damages.

But this they did not desire, and they did not request any amendment of their complaints.

As to availability of remedy under State Law, which we shall discuss under Point III, petitioners can object to the admission of illegal evidence at their State trial, and if convicted, they can apply immediately to the Supreme Court of New Jersey upon the constitutional question involved (permissible under the N. J. Rules of Practice and Procedure), and upon an adverse decision, they can apply to this Court for review by certiorari (*Darr* v. *Burford*, 70 S. Ct. 587).

In *Hague* v. *C. I. O.*, *supra*, this Court discussed the narrow limitation of the jurisdiction of the Federal courts under the Civil Rights Acts, as follows (p. 507 of 307 U. S.):

> "First. Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, infra, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon United States courts has been narrowly limited."

POINT III.

The principles of exhaustion of State remedies and of comity between the Federal Government and the States are applicable.

Our New Jersey Constitution has a provision identical to the Fourth Amendment to the Federal Constitution.

Art. 1, Par. 7 of the New Constitution of 1947 provides:

> "The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and things to be seized."

The court of last resort in New Jersey is the Supreme Court of New Jersey; under the former Constitution of 1844 it was the Court of Errors and Appeals.

The rule of evidence has been followed in New Jersey that property unlawfully taken by unreasonable search and seizure is admissible in evidence if evidential *per se*. (*State* v. *MacQueen*, 69 N. J. L. 522; *State* v. *Mausert*, 88 N. J. L. 286; *State* v. *Giberson*, 99 N. J. L. 85; *State* v. *Lyons*, 99 N. J. L. 301; *State* v. *Black*, 5 N. J. Misc. 48; *State* v. *Pinsky*, 6 N. J. Super. 90).

Only the *Mausert*, *Giberson* and *Lyons* cases reached the former Court of Errors and Appeals. In the *MacQueen* case the opinion was rendered in the former New Jersey

Supreme Court by Justice Pitney who later became a member of the United States Supreme Court.

Examination of those cases will disclose that in the *Mausert* case (disorderly house) certain books were seized by the officers armed with an arrest warrant, and it was held that the seizure was not unreasonable because the books were found in defendant's immediate control.

In the *Giberson* case (murder), officers going to defendant's home without warrant seized papers and documents, and the search and seizure were held to be not unreasonable because the property was taken with defendant's "full consent".

In the *Lyons* case (disorderly house), officers raided defendant's gambling house above a saloon also conducted by defendant. At the time of the arrest, the officers seized some papers from a file on the back-bar of the saloon portion of the premises, and the papers were held to be admissible to establish ownership and control by the defendant.

In the *MacQueen* case (riot), regarded as the leading case on the subject, a newspaper article written by defendant was taken from him while under arrest, and it was a question whether the seizure was a reasonable one, the Court stating (p. 528 of opinion): "And it would seem after arrest made the person of the accused may properly be examined without a search-warrant in order to find evidence of his guilt, and that such an examination would not be deemed an unreasonable search."

The same constitutional questions raised in the Federal courts can well be urged in the State courts of New Jersey

during the criminal prosecutions; and the same questions may be raised on appeal before the State court of last resort. Thereafter, if adversely determined, petitioners may apply to this Court for review by certiorari, as was done in the *Wolf* case, *supra*.

Under our present Rules of practice and procedure, petitioners may apply directly to the Supreme Court for certification to the trial court when a substantial constitutional question arises.

New Jersey Supreme Court Rule 1:5-3 provides:

> "Petitions for certification to the trial courts will be entertained on final judgments only in the following types of cases:
>
> "(a) Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court."

The doctrine of exhaustion of state remedies and the rule of comity has been abundantly supported by this Court.

In *Darr* v. *Burford, supra*, a prisoner serving a sentence under a State conviction applied for habeas corpus in the State courts, claiming he had been deprived of his constitutional rights relating to right of counsel. After exhausting his remedies in the State courts he applied for habeas corpus in the Federal District Court and his application was denied. The denial was upheld by the Circuit Court of Appeals. On certiorari, this Court held that the habeas corpus was properly denied, because, in order to comply with the rule of exhaustion of State remedies and the rule of comity, the defendant should have applied to this Court

for certiorari immediately after the determination by the State Supreme Court which had passed squarely upon the constitutional questions involved. In reaffirming the rule of comity and the doctrine of exhaustion of State remedies, this Court emphasized the necessity of avoiding conflict between Federal and State courts, whereby one court refuses to take action until the courts of another sovereignty had had an opportunity of passing on the matter. It approved the following language taken from *Covell* v. *Heyman*, 111 U. S. 176, 182 (p. 591 of opinion in 70 S. Ct.):

> " 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity.' "

See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Trent* v. *Hunt*, 39 F. Supp. 376; aff'd 314 U. S. 573, 62 S. Ct. 115, 86 L. Ed. 465.

In *Parker* v. *County of Los Angeles*, 338 U. S. 327; 70 S. Ct. 161, which involved the constitutionality of a California statute providing for a "Loyalty Check" program, this Court again affirmed the rule of comity and exhaustion of State remedies in the following emphatic language (p. 163 of opinion in 70 S. Ct.):

> " * * * If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will

be time enough for the petitioners to urge denial of a Federal right after the State courts have definitely denied their claims under State law.

"Due regard for our Federal system requires that this Court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law. This is not what is invidiously called a technical rule. The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court. Since the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision, all subsidiary questions fall." (Cases cited).

In the instant cases, we submit the State courts are competent to decide whether petitioners had been deprived of their constitutional rights. The appropriate time for the determination of any constitutional question is at the trial of the indictments in the State courts and on appeal to the New Jersey Supreme Court. If the trial court should err to the prejudice of petitioners' constitutional rights it cannot be assumed that the New Jersey Supreme Court would suffer the error to go uncorrected. Under any circumstances, petitioners can always apply to this Court for writ of certiorari to review any abridgement of their constitutional rights by the court of last resort of New Jersey.

We submit the Court of Appeals properly affirmed the District Court's dismissal of the proceedings by stating:

"Every question here raised by the appellants may be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open."

Conclusion.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the Court below should be affirmed.

Respectfully submitted,

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